Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-66–09 OF 2016(W)

RAUS SHARIF CHIEF JUSTICE, RICHARD MALANJUM CJ (SABAH AND SARAWAK), ZAINUN ALI, ZAHARAH IBRAHIM AND BALIA YUSOF FCJJ

16 APRIL 2018

Companies and Corporations — Derivative action — Company in deadlock position — Equal shareholding — Directors have opposing views in company which was going concern — Whether shareholder could bring derivative action — Test of 'wrongdoer control' — Whether shareholder could file petition to wind up company on just and equitable grounds — Whether availability of winding up company on just and equitable grounds as alternative remedy disentitles shareholder from opting to bring derivative action on behalf of company — Companies Act 2016

The third defendant at the High Court, was a director of the appellant ('the second defendant') and a shareholder of Perak Communication Technology Sdn Bhd. The State of Perak appointed the second defendant as the sole concessionaire to undertake construction works in the State of Perak. The second defendant then entered into an agreement with three telecommunications companies ('Group A operators') and agreed to construct telecommunication towers at its own cost and rent them to the Group A operators for a fixed period of time. The first respondent ('the plaintiff') and the second defendant entered into an arrangement to create a separate entity, the first defendant. The only two shareholders of the first defendant were the plaintiff and the second defendant, each holding 50% of the shares. The plaintiff, the second defendant, the second respondent ('the first defendant') and PINS Capital Sdn Bhd, a wholly-owned subsidiary of the second defendant, entered into a management agreement. The same four parties also entered into a first supplemental management agreement and it was agreed that the first defendant was to be paid a maintenance fee in accordance with the terms of the management agreement. When disputes arose, the second defendant proceeded to take over all the books and accounts of the first defendant. Subsequently, the plaintiff contended that the second and third defendants deprived the first defendant of funds to sustain operations, therefore preventing the first defendant from performing the construction,

maintenance and one-stop centre services. The plaintiff initiated a common law derivative action on behalf of itself and the first defendant for losses and damages resulting from an alleged breach of contract by the second and third defendant and alleged breach of fiduciary duty by the third defendant. The second and third defendants filed a counterclaim against the plaintiff and the first defendant, alleging that the first defendant was in breach of the management agreement and first supplemental agreement. The High Court: (a) allowed the plaintiff's claim against the first defendant; (b) dismissed the plaintiff's claim against the third defendant; and (c) dismissed the second defendant's counterclaim in part. Aggrieved by the decision of the High Court, the plaintiff and the second defendant filed separate appeals to the Court of Appeal. At the Court of Appeal, the second defendant raised a preliminary issue of whether the suit before the High Court was a properly constituted derivative action. The Court of Appeal dismissed the preliminary issue raised by the second defendant and found that the suit filed by the plaintiff was a properly constituted derivative action. The Court of Appeal held that: (i) the test to establish wrongdoer control for a derivative action was one of de facto control; being a majority or minority shareholder was not conclusive; and (ii) wrongdoer control could be satisfied in a deadlocked company where the shareholding is split 50–50, where the aggrieved party could be prevented from bringing an action in the name of the company. Hence the present appeal.

Held, dismissing the appeal with costs:

(1) Where the board of a company is equally split between directors with opposing views, the management of the company is said to be in a deadlock. Where the shareholding of a company is equally split between shareholders taking opposing stances, the body of members of the company is said to be in a deadlock (see para 58).

(2) Where there is a deadlock in both the board and the shareholders of the company which is a going concern, there is no objection in principle to a shareholder bringing a derivative action on behalf of the company. The test to establish 'wrongdoer control' is one of substance. The requirement of control is satisfied where the company is practically incapable of being set in motion to bring an action against the wrongdoers for its benefit. A deadlock situation with no clear-cut majority or minority shareholders does not preclude an equal shareholder from bringing a derivative action on behalf of the company. A shareholder may not bring a derivative action on the company's behalf it the company is already in liquidation. Where there is a deadlock in the board and the shareholders of the company which is a going concern, there is no objection in principle to a shareholder filing a petition to wind up the company on just and equitable grounds under s 218(1)(i) of the Act. The availability of winding up the company on just and equitable grounds under s 218(1)(i) of the Act as an alternative remedy does not in itself disentitle a

shareholder from opting instead to bring a derivative action on behalf of the company which is a going concern (see para 102).

(3) The broad proposition that a derivative action is disallowed if winding up is available as an alternative remedy in respect of a company which is a going concern lacked support in authority and basis in principle. The option of winding up does not itself operate as an automatic bar to a shareholder bringing a derivative action on behalf of a going concern company. Additionally, winding up a company which is a going concern has generally been regarded as a drastic measure. The appropriate route for a shareholder in any case would depend on the nature of the relief sought and whether the necessary elements for the remedy could be satisfied on the facts and circumstances of the case (see para 101).

(4) The second defendant had not adduced evidence to indicate that the option of winding up the first defendant under s 218(1)(i) of the Act was considered as an alternative remedy at the time the present suit was filed. At the time the derivative action was instituted, the first defendant appeared to be treated as a going concern; there was no question of the first defendant being in liquidation. It was conspicuous that the second defendant themselves did not file a petition to wind up the first defendant either before or after the plaintiff commenced the present suit. It was not open for the second defendant to now raise the theoretical availability of the winding up remedy as a basis to contend that the action should not have been allowed to proceed in the first place. The grounds of objection raised by the second defendant were dismissed and the derivative action was properly instituted (see paras 106–107).

[Bahasa Malaysia summary

Defendan ketiga di Mahkamah Tinggi adalah pengarah perayu ('defendan kedua') dan pemegang saham Perak Communication Technology Sdn Bhd. Negeri Perak melantik defendan kedua sebagai pemegang tunggal konsesi untuk menjalankan kerja-kerja pembinaan di negeri Perak. Defendan kedua seterusnya memeterai satu perjanjian dengan tiga syarikat telekomunikasi ('pengendali-pengendali Kumpulan A') dan bersetuju membina menara-menara telekomunikasi dengan kosnya sendiri dan menyewakan kesemuanya kepada pengendali-pengendali Kumpulan A bagi tempoh masa yang ditetapkan. Responden pertama ('plaintif') dan defendan kedua memeterai satu perancangan membentuk satu entiti berasingan iaitu defendan pertama. Dua pemegang saham defendan pertama cuma plaintif dan defendan kedua dan masing-masing memegang 50% saham. Plaintif, defendan kedua, responden kedua ('defendan pertama') dan PINS Capital Sdn Bhd, sebuah subsidiari yang dimiliki sepenuhnya oleh defendan kedua, memeterai satu perjanjian pengurusan. Empat pihak yang sama ini memeterai satu perjanjian tambahan pertama pengurusan dan disetujui bahawa defendan pertama dibayar yuran penyelenggaraan selaras dengan terma-terma perjanjian

pengurusan. Apabila timbul pertikaian, defendan kedua seterusnya mengambil kesemua buku dan akaun defendan pertama. Berikutan itu, plaintif menghujahkan defendan kedua dan ketiga menafikan defendan pertama akan dana untuk mengekalkan operasi lantas menghalang defendan pertama menjalankan perkhidmatan pembinaan, penyelenggaraan dan pusat sehentian. Plaintif memulakan satu tindakan terbitan di bawah common law bagi pihak syarikatnya dan defendan pertama bagi kehilangan dan kerugian yang timbul susulan dakwaan pelanggaran kontrak oleh defendan kedua dan ketiga dan dakwaan pelanggaran fidusiari oleh defendan ketiga. Defendan kedua dan ketiga memfailkan tuntutan balas terhadap plaintif dan defendan pertama, mendakwa bahawa defendan pertama melanggar perjanjian pengurusan dan perjanjian tambahan pertama. Mahkamah Tinggi: (a) membenarkan tuntutan plaintif terhadap defendan pertama; (b) menolak tuntutan plaintif terhadap defendan ketiga; dan (c) menolak sebahagian tuntutan balas defendan kedua. Terkilan dengan keputusan Mahkamah Tinggi, plaintif dan defendan kedua memfailkan rayuan-rayuan berasingan di Mahkamah Rayuan. Di Mahkamah Rayuan, defendan kedua membangkitkan isu awalan sama ada guaman di Mahkamah Tinggi adalah tindakan terbitan yang dimulakan dengan betul. Mahkamah Rayuan memutuskan: (i) ujian membuktikan kawalan pelaku salah dalam tindakan terbitan adalah kawalan de facto; menjadi pemegang saham majoriti atau minoriti tidak muktamad; dan (ii) kawalan pelaku salah boleh dilakukan dalam kebuntuan syarikat yang pegangan sahamnya terbahagi pada 50–50 dan pihak terkilan boleh dihalang daripada memulakan tindakan atas nama syarikat. Maka timbul rayuan ini. Isu yang timbul bagi pemutusan mahkamah adalah sama ada, bawah undang-undang, tindakan terbitan boleh dimulakan bagi manfaat sesebuah syarikat, pengurusan dan kawalan yang menemui kebuntuan.

Diputuskan, menolak rayuan dengan kos:

(1) Apabila Lembaga syarikat terbahagi sama rata antara pengarah-pengarah dengan pandangan bertentangan, pengurusan syarikat dikatakan menemui kebuntuan. Apabila pegangan saham syarikat terbahagi sama rata antara pemegang saham yang mempunyai pandangan bertentangan, badan ahli-ahli syarikat ini dikatakan menemui kebuntuan (lihat perenggan 58).

(2) Apabila terdapat kebuntuan dalam kedua-dua lembaga dan pemegang saham syarikat yang sudah berjalan, tiada bantahan, secara prinsipnya, terhadap pemegang saham untuk membawa tindakan terbitan bagi pihak syarikat. Ujian untuk membuktikan 'kawalan pelaku salah' adalah berdasarkan kandungannya. Keperluan kawalan dipenuhi apabila syarikat tidak lagi, secara praktiknya, diusulkan untuk memulakan tindakan terhadap pelaku-pelaku salah bagi manfaatnya. Situasi bunti tanpa pemegang saham majoriti dan minoriti yang jelas tidak menghalang pemegang saham sama rata membawa tindakan terbitan

bagi pihak syarikat jika syarikat tersebut dalam likuidasi. Apabila terdapat kebuntuan dalam Syarikat dan pemegang-pemegang saham syarikat yang sudah berjalan, tiada bantahan, secara prinsipnya, terhadap pemegang saham yang memfailkan petisyen untuk menggulung syarikat tersebut berdasarkan alasan-alasan adil dan berekuiti bawah s 218(1)(i) Akta. Kewujudan penggulungan syarikat atas alasan adil dan berekuiti bawah s 218(1)(i) Akta sebagai remedi alternatif tidak, dengan sendirinya, menghilangkan hak pemegang saham memilih, sebaliknya, untuk memulakan tindakan terbitan bagi pihak syarikat yang sudah berjalan (lihat perenggan 102).

(3) Cadangan luas bahawa tindakan terbitan tidak dibenarkan jika penggulungan wujud sebagai remedi alternatif bagi syarikat sudah berjalan tiada sokongan nas mahupun berprinsip asas. Pilihan penggulungan tidak, dengan sendirinya, beroperasi sebagai halangan automatik terhadap seorang pemegang saham yang membawa tindakan terbitan bagi pihak syarikat yang sudah berjalan. Tambahan lagi, penggulungan sesebuah syarikat yang sudah berjalan, secara amnya, dianggap sebagai langkah mendadak. Jalan yang sebetulnya bagi seorang pemegang saham, dalam apa-apa jua kes, bergantung pada sifat relief yang dipohon dan sama ada elemen-elemen penting bagi remedi tersebut boleh dipenuhi berdasarkan fakta dan hal keadaan kes (lihat perenggan 101).

(4) Defendan kedua tidak mengemukakan keterangan untuk menunjukkan penggulungan defendan pertama bawah s 218(1)(i) Akta adalah pilihan yang dianggap remedi alternatif semasa guaman ini difailkan. Pada masa tindakan terbitan dimulakan, defendan pertama kelihatan dianggap sebagai sudah berjalan; tiada persoalan timbul tentang defendan pertama dalam likuidasi. Mudah dilihat bahawa defendan kedua sendiri tidak memfailkan petisyen untuk menggulung defendan pertama sama ada sebelum atau selepas plaintif memulakan guaman ini. Tidak terbuka buat defendan kedua membangkitkan kewujudan teori remedi penggulungan sebagai asas untuk menghujahkan tindakan tersebut sepatutnya dibenarkan diteruskan dari awal lagi. Alasan-alasan bantahan yang dibangkitkan oleh defendan kedua ditolak dan tindakan terbitan dimulakan dengan betul (lihat perenggan 106–107).]

Notes

For cases on derivative action in general, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 156–177.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, CA (refd)

Anglo-Eastern (1985) Ltd & Anor v Knutz & Ors [1987] 3 HKC 80, CA (refd)

Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame [1906] 2 Ch 34, CA (refd)
Bamford and Another v Bamford and Others [1969] 1 All ER 969, CA (refd)
Barrett v Duckett and others [1995] 1 BCLC 243, CA (refd)
Burland v Earle [1902] AC 83, PC (refd)
Chong Choon Chai & Anor v Tan Gee Cheng & Anor [1993] 3 SLR 1, CA (refd)
Chua Kien How v Goodwealth Trading Pte Ltd & Anor [1992] 2 SLR 296, CA (refd)
Ebrahimi v Westbourne Galleries Ltd and others [1972] 2 All ER 492; [1973] AC 360, HL (refd)
Edwards and Another v Halliwell and Others [1950] 2 All ER 1064, CA (refd)
Estmanco (Kilner House) Ltd v Greater London Council [1982] 1 All ER 437, Ch D (refd)
Fargro Ltd v Derek Godfroy and others [1986] BCLC 370; [1986] 3 All ER 279, Ch D (refd)
Ferguson v Wallbridge [1935] 3 DLR 66, PC (refd)
Foss v Harbottle (1843) 67 ER 189 (refd)
Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung, Re [1978] 2 MLJ 227, PC (refd)
Liu Hsiao Cheng v Wong Shu Wai & Ors [2015] HKCU 1957 (refd)
Mozley v Alston (1847) 41 ER 833 (refd)
Ng Eng Hiam v Ng Kee Wei & Ors [1965] 1 MLJ 238, PC (refd)
Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113, FC (refd)
Pang Yong Hock v PKS Contracts Services Pte Ltd [2004] SGCA 18, CA (refd)
Parallel Media Group Plc & Anor v Asia PGA Bhd & Ors [2004] 6 MLJ 37, HC (refd)
Prudential Assurance Co Ltd v Newman Industries Ltd and others (No 2) [1982] 1 All ER 354, CA (refd)
Russell v Wakefield Waterworks Company (1875) LR 20 Eq 474 (refd)
Sim Yong Kim v Evenstar Investments Pte Ltd [2006] 3 SLR 827, CA (refd)
Tan Guan Eng & Anor v Ng Kweng Hee & Ors [1992] 1 MLJ 487, HC (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433, PC (refd)
Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177, FC (refd)
Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd [1995] 1 MLJ 769, SC (refd)
Ting Chong Maa v Chor Sek Choon [1989] 1 MLJ 477, HC (refd)
Ting Sing Ning (alias Malcolm Ding) v Ting Chek Swee (alias Ting Chik Sui) and others [2008] 1 SLR 197, CA (refd)
Universal Project Management Services Ltd v Fort Gilkicker Ltd and others [2013] Ch 551, Ch D (refd)
Waddington Ltd v Chan Chun Hoo & Ors [2009] 4 HKC 381 (refd)
Wallersteiner v Moir (No 2); Moir v Wallersteiner and others (No 2) [1975] QB 373, CA (refd)

A *Yenidje Tobacco Company, Limited, In re* [1916] 2 Ch 426, CA (refd)

Legislation referred to

Companies Act 1948 [UK] s 222(f)
Companies Act 1965 (repealed by the Companies Act 2016) ss 181, 218, 218(1)(i)
B Companies Act 1990 [SG] s 254(1)(i)
Companies Act 2016 s 347(3)

C **Appeal from:** Civil Appeal No W-02(NCC)(W)-2442–11 of 2013 (Court of Appeal, Putrajaya)

Gopal Sri Ram (RK Sharma, Phang Zheng Jack and David Yii with him) (Vicknaraj, RD Ratnam, Rajesh Kumar & Assoc) for the appellant.
Bastian Vendargon (Leong Kwong Wah, Vincent Lim Seng Liang and S Ravenesan with him) (Dennis Nik & Wong) for the first respondent.
D *Norina Zainol Abidin (Senior Federal Counsel, official receiver and liquidator for Pins OSC & Maintenance Services Sdn Bhd) for the second respondent.*

E **Raus Sharif Chief Justice (delivering judgment of the court):**

INTRODUCTION

[1] The present appeal concerns the preliminary issue raised by the appellant as to whether the suit before the High Court was a properly constituted derivative action.

[2] The first respondent commenced a derivative action for and on behalf of the second respondent in the High Court. On 26 September 2013, the High Court allowed the claim.

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[3] On 21 March 2016, the Court of Appeal dismissed the preliminary issue raised by the appellant and found that the suit filed by the first respondent in the High Court was a properly constituted derivative action.

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[4] Leave to appeal was granted by this court on 4 August 2016 for a single question of law which reads:

> Whether a derivative action may in law be brought for the benefit of a company, the management and control of which are deadlocked.

I

Material facts

[5] At the High Court, the first respondent was the plaintiff, the second respondent was the first defendant, and the appellant was the second

defendant. The third defendant in the High Court, Dato' Seri Dr Abdullah Fadzil Che Wan, is not a party to this appeal. In this appeal, we will refer to the parties as they were referred to at the High Court. A

[6] The third defendant is a director of the second defendant. The third defendant is also a 90% shareholder of Perak Communication Technology Sdn Bhd, which in turn wholly owns the second defendant. B

[7] On or about 11 July 2005, the second defendant was granted a licence by the Malaysian Communications and Multimedia Commission ('MCMC') to provide network facilities to telecommunication providers ('the licence'). By a concession agreement dated 10 July 2007, the State of Perak appointed the second defendant as the sole concessionaire to undertake construction works in the State of Perak under the licence. C

[8] Pursuant to the licence, the second defendant entered into a licence agreement with three telecommunication companies, Maxis, Digi, and Celcom ('Group A operators'), whereby the second defendant agreed to construct telecommunication towers at its own cost and rent them to the Group A operators for a fixed period of time. D E

[9] By a shareholders' agreement dated 21 May 2007, the plaintiff and the second defendant entered into an arrangement to create a separate entity, the first defendant. Significantly, the only two shareholders of the first defendant were the plaintiff and the second defendant, each holding 50% of the shares. F

[10] The board of directors of the first defendant consisted only of two directors, one each appointed by the plaintiff and the second defendant respectively. The directors were the third defendant, who was the second defendant's nominee; and Hj Ahmad Kamal bin Zakaria (PW1), the plaintiff's nominee. The third defendant was also the Chairman of the Board of Directors. G

[11] The plaintiff, the first defendant, and second defendant, and PINS Capital Sdn Bhd, a wholly owned subsidiary of the second defendant, entered into a management agreement dated 21 May 2007. The first defendant undertook to perform the construction services, maintenance services and one-stop centre services defined therein. On 27 May 2007, the same four parties also entered into a first supplemental management agreement, whereby it was agreed that the first defendant was to be paid a maintenance fee in accordance with the terms of the management agreement. H I

[12] Pursuant to the above agreements, the first defendant constructed and maintained 87 telecommunications towers.

[13] As events turned out, besides the Group A operators, some other telecommunication providers ('Group B operators') also entered into an agreement with the second defendant. Relying on the management agreement, the plaintiff contended that the second and third defendants must account to the first defendant for the maintenance fee computed at 20% of the rental proceeds and other payments received from both the Group A and Group B operators. However, the second defendant's position was that the Group B operators do not form part of the first defendant's scope of works, and the first defendant is thus not entitled to any sums received by the second defendant from the Group B operators.

[14] On 3 May 2011, the second defendant sent a letter to the first defendant, stating that the first defendant was not entitled to maintenance fees from the revenue received from Group B operators, and that the second defendant would take steps to recover such fees previously paid to the first defendant.

[15] In March 2011, the second defendant took over all the books and accounts of the first defendant. Subsequently, the plaintiff contended that the second and third defendant deprived the first defendant of funds to sustain operations, thereby preventing first defendant from performing the construction, maintenance, and one-stop centre services.

At the High Court

[16] On 4 July 2012, the plaintiff commenced a common law derivative action on behalf of itself and the first defendant. The claim was for the loss and damage suffered by the plaintiff and the first defendant, as a result of alleged breach of contract by the second and third defendants, and alleged breach of fiduciary duty on the part of the third defendant.

[17] In the statement of claim, the plaintiff stated that it brought the claim as a shareholder and for the benefit of the first defendant. The plaintiff averred that:

(a) the second and third defendants were wrongdoers, whereas the first defendant was the victim;

(b) there was a deadlock in the first defendant's board of directors, because the third defendant was a director of both the first and second defendants;

(c) there was also a deadlock in the first defendant's body of members, because the plaintiff and the second defendant were the only two shareholders;

(d) the third defendant was in a position of serious conflict of interest; and

(e) as such, no resolution could possibly be passed to enable the first defendant to bring an action against the second and third defendants.

[18] The second and third defendants disputed the plaintiff's claim. The second defendant further filed a counterclaim against the plaintiff and the first defendant, alleging that the first defendant was in breach of the management agreement and first supplemental agreement.

[19] On 31 July 2012, the second defendant made an application to strike out the plaintiff's claim on the basis that the derivative action was not properly constituted. The application was dismissed by the High Court. The second defendant appealed to the Court of Appeal against the High Court's dismissal of the application, but the appeal was discontinued.

[20] After a full trial, the High Court allowed the plaintiff's claim against the second defendant with costs, and dismissed the plaintiff's claim against the third defendant. The High Court also dismissed the second defendant's counterclaim with costs, save for the counterclaim in respect of priority payments made by the second defendant to MCMC. The issue of the propriety of the derivative action was not further ventilated at trial and not considered by the learned trial judge in her grounds of judgment.

At the Court of Appeal

[21] Aggrieved, the plaintiff and the second defendant filed separate appeals against the decision of the High Court to the Court of Appeal. At the hearing of the appeals, counsel for the second defendant commenced his argument by raising a preliminary issue, whether the suit before the High Court was a properly constituted derivative action. Counsel submitted that the said issue should be decided before the appeal is heard on the merits, and parties agreed to confine their submissions at that stage to that issue alone. Pursuant thereto, the Court of Appeal granted leave for the second defendant to amend the memorandum of appeal to include the said issue as one of its grounds of appeal.

[22] On 21 March 2016, the Court of Appeal dismissed the preliminary issue raised by the second defendant. The Court of Appeal held that the test to establish wrongdoer control for a derivative action is one of de facto control; being a majority or minority shareholder is not conclusive. As a matter of law, it was held that wrongdoer control could be satisfied in a deadlocked company where the shareholding is split 50–50, where the aggrieved party could be prevented from bringing an action in the name of the company.

[23] The Court of Appeal noted that the issue of derivative action was raised in the striking out application which was dismissed by the High Court, and was not an issue during the trial. By withdrawing the appeal against that decision, the second defendant was held to have been estopped from raising the issue. The issue was no longer in question; the Court of Appeal found it 'scandalous' for the second defendant to submit at that juncture that the claim ought to have been dismissed in the first instance.

[24] Notwithstanding the above, the Court of Appeal engaged in a detailed consideration of the evidence adduced at trial and made the following findings of fact:

(a) there was a deadlock in the board of directors and the body of members of the first defendant;

(b) the plaintiff and the first defendant were the victims;

(c) the second and third defendants were the wrongdoers;

(d) the first defendant was completely under the control of the second and third defendants;

(e) the plaintiff was not in control of the first defendant and did not cause its current predicament; and

(f) a loss of substratum occurred in the first defendant.

[25] In view of the evidence, the Court of Appeal held that the plaintiff could be treated as being under the same disability as a minority shareholder despite holding the same number of shares as the second defendant, for it was not possible for the plaintiff to set the first defendant in motion to bring an action against the second and third defendants.

[26] The Court of Appeal noted that the plaintiff had filed a petition on 27 January 2014 to wind up the first defendant on the just and equitable rule, after the High Court judgment was delivered on 26 September 2013. The Court of Appeal rejected the submission by counsel for the second defendant that the plaintiff was not entitled to bring the derivative action in view of the alternative available remedy of winding up, relying on the English case of *Barrett v Duckett and others* [1995] 1 BCLC 243. In doing so, the Court of Appeal distinguished *Barrett v Duckett and others* on the grounds of the 'unusual circumstances' in that case, and highlighted that in the present case, the first defendant was a going concern and there was no issue of it being in liquidation before the action was filed. Further, it was held that the second defendant could not support its position by asserting that the derivative action was not bona fide or that the plaintiff had the opportunity to put the first

defendant in liquidation; these arguments were not pleaded by the second defendant.

[27] The Court of Appeal explained the difference between a derivative action and a winding up action as follows:

> Derivative action is a procedural convenience for enabling the court to do justice and for the benefit of a company which is controlled by miscreant director and shareholder and persons associated to them. A winding up action, on the other hand, provides a separate remedy to a shareholder to seek redress for his grievance and for his benefit. We wish to emphasise that the court should not shut its door to any person who comes forward to start the proceedings for the benefit of a company and not for some other purpose (*Nurcombe v Nurcombe*).

[28] Accordingly, the Court of Appeal held that the derivative action was properly mounted, and that the appeal ought to be heard fully on the merits.

Submissions

[29] Learned counsel for the second defendant submitted that company law provides for different remedies to resolve disputes between shareholders:

(a) s 181 of the Companies Act 1965 ('the Act'), in the case of minority oppression;

(b) winding up on the just and equitable ground under s 218 of the Act, in the case of a deadlock or breakdown of mutual trust and confidence; and

(c) derivative action, in the case where the wrongdoers are in control of the company so that the company is incapable of bringing an action.

[30] On the requirements for a derivative action, the second defendant contended that it is an essential element that the complainant must be a minority shareholder. It was argued that the decision of the High Court in *Ting Chong Maa v Chor Sek Choon* [1989] 1 MLJ 477 and the Hong Kong decision in *Liu Hsiao Cheng* were wrongly decided, being in contravention of the fundamental principle that the court has no jurisdiction to interfere in the internal affairs of a company save by recourse to winding up. It was further argued that where a statutory remedy was given for a particular purpose, it must be resorted to; to allow a derivative action in the case of a deadlock would bypass the just and equitable winding up remedy specifically provided for under the Act. As such, the second defendant submitted that in a deadlock situation, the only remedy is to petition for a winding up.

[31] Learned counsel for the plaintiff submitted that a derivative action and a winding up petition provide for separate remedies open to a shareholder: the former is brought for the benefit of the company, whereas the latter is brought

A for the shareholder's own benefit. The plaintiff argued that *Liu Hsiao Cheng* laid down, among others, the following principles:

(a) a shareholder in a 50/50 deadlocked company is not precluded from bringing a derivative action for the benefit of the company;

B (b) in such a situation, the shareholder is entitled to bring a derivative action as a matter of law. Whether he can succeed in establishing wrongdoer control on the facts is another matter altogether; and

(c) control in a negative sense can be established where the aggrieved C members and the wrongdoers are in a 50/50 deadlock, such that either can prevent the company from taking action.

[32] On those principles, the plaintiff submitted that the element of wrongdoer control has been satisfied in the present case. With reference to the D judgment of the High Court dated 15 August 2014 in the winding up proceedings, the plaintiff further noted that the High Court found insufficient evidence to conclude an irretrievable breakdown of mutual trust and confidence within the first defendant, and to determine who was the author of the breakdown. It was noted that no finding was made on who was in control. E

[33] Additionally, the plaintiff argued that the question of law on which leave to appeal was granted, and the original preliminary issue before the Court of Appeal, related to whether a deadlock situation was a bar to bringing a F derivative action. However, it was argued that the basis of the preliminary issue was subsequently changed, and the main contention before the Court of Appeal revolved around the issue of 'wrongdoer control'. In the circumstances, the plaintiff submitted that the present question of law was not an issue before the Court of Appeal and cannot now be resurrected. G

[34] On behalf of the official receiver and liquidator of the first defendant, the learned senior federal counsel submitted that during the course of the proceedings in the High Court and the Court of Appeal, the first defendant's status as a company was a going concern and there was no issue of it being in H liquidation. However, it was stated that the first defendant was subsequently wound up by a court order dated 27 October 2016 upon a petition by the Government of Malaysia, and a liquidator was appointed.

I **[35]** It was submitted on behalf of the first defendant that the derivative action was properly mounted. The learned senior federal counsel contended that wrongdoer control can occur in a situation where shareholding is equally split, and that a derivative action can lie if the shareholder bringing the action is not in de facto control. Since the plaintiff and the second defendant have

equal voting power, it was contended that the plaintiff could be treated as a minority shareholder, for it was not in a position to set in motion the deadlocked first defendant.

DERIVATIVE ACTION

Rule in Foss v Harbottle

[36] The present suit was commenced in 2012 as a derivative action at common law. We observe that the new Companies Act 2016 has abrogated the right of any person to bring any proceedings on behalf of a company at common law (sub-s 347(3)). For the present purposes, we will confine our discussion to common law derivative actions filed before the Companies Act 2016 came into force.

[37] It is instructive to begin with an outline of the general principles underlying derivative actions at common law. A comprehensive restatement of the law on derivative actions and all its requirements would be beyond the scope of this appeal. In this discussion, we will consider whether the remedy is available *in principle* in a situation of deadlock in the management and shareholding of a company, and in particular whether the element of 'wrongdoer control' can be satisfied.

[38] The starting point is the case of *Foss v Harbottle* (1843) 67 ER 189. The classic articulation of the rule in *Foss v Harbottle* is found in the passage by Jenkins LJ in *Edwards and Another v Halliwell and Others* [1950] 2 All ER 1064 at p 1066:

> *The rule in Foss v Harbottle, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter* for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*. No wrong had been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. (Emphasis added.)

[39] In essence, the rule in *Foss v Harbottle* consists of two separate but related principles, which have been respectively termed as the 'proper plaintiff rule' and the 'majority rule'.

[40] The majority rule is based on judicial non-interference in corporate affairs. The traditional view is that the majority of shareholders in a general meeting has the power to bind the whole body by the terms of incorporation, and every individual shareholder is taken to have entered the corporation upon those terms (*Foss v Harbottle* at p 203). The general meeting of the company is capable of ratifying or approving the acts complained of, and to decide whether or not to institute proceedings in respect of those acts (*Bamford and Another v Bamford and Others* [1969] 1 All ER 969 at p 976).

[41] Since the seminal case of *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame* [1906] 2 Ch 34, the law has shifted away from the notion of shareholders as having ultimate control over all company matters. This development was recently summarised by this court in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177 at paras [106]–[120]. The modern view is that the division of powers between the board of directors and the shareholders in a general meeting depends on the construction of the articles of association. Where the board of directors is given powers to manage the company, the shareholders in a general meeting cannot interfere with their exercise. Nevertheless, 'at common law there is a residual power on the part of the shareholders in general meetings to act when the board is unable or unwilling to do so itself' (*Petra Perdana* at para [120]). The present appeal raises no issue in respect of the majority rule.

[42] The proper plaintiff rule is founded on the fundamental principle that a company is a legal entity separate and distinct from its members. Where a cause of action is vested in the company, it is the company alone that can sue (per Lord Millett in the Hong Kong Court of Final Appeal in *Waddington Ltd v Chan Chun Hoo & Ors* [2009] 4 HKC 381 at para [47]). Lord Denning MR explained the rationale for the rule succinctly in *Wallersteiner v Moir (No 2); Moir v Wallersteiner and others (No 2)* [1975] QB 373 at p 390:

> It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle* (1843) 2 Hare 461.

[43] Thus where the company is capable of being put in motion to bring an action, the court will not allow some shareholders to bring the action on behalf of themselves and others (*Mozley v Alston* (1847) 41 ER 833 at p 837).

Exceptions to the proper plaintiff rule

[44] However, a strict application of the proper plaintiff rule entails harsh ramifications in certain situations. The difficulties arising from a situation where the wrongdoers are in control of the company were exemplified in *Wallersteiner v Moir (No 2); Moir v Wallersteiner and others (No 2)* at p 390:

> The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs — by directors who hold a majority of the shares — who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.

[45] Similar concerns were highlighted by Sir Megarry V-C in *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437 at p 443:

> When Sir James Wigram V-C decided *Foss v Harbottle* it may be doubted whether he foresaw the vigorous and active life which his decision would lead, or the many controversial obscurities that would arise about actual or possible exceptions from the rule that he was laying down ... If the rule in *Foss v Harbottle* had remained unqualified, the way would have been open for the majority to stultify any proceedings which were for the benefit of the minority and to the disadvantage of the majority.

[46] The necessity to carve out exceptions to the proper plaintiff rule to avoid potential injustice was recognised in *Foss v Harbottle* itself. It was held (at p 203) that:

> If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that ... the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

[47] It came to be recognised that the rule in *Foss v Harbottle* was not universal but subject to exceptions; the exceptions 'depend very much on the necessity of the case; that is, the necessity for the Court doing justice' (*Russell v Wakefield Waterworks Company* (1875) LR 20 Eq 474 at p 480). Although the injustice is not itself the test, 'it is nevertheless a reason, and an important reason, for making exceptions from the rule'; and courts have proceeded by formulating a number of individual exceptions (*Estmanco* at p 444).

[48] Thus, where the wrongdoers are in control of the company such that the company is incapacitated from bringing an action, the court would allow an action to be brought by individual shareholders on behalf of the company to obtain redress. The exception was a 'mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress' (*Burland v Earle* [1902] AC 83 (PC) at p 93). This exception, which came to be known as a 'fraud on the minority', was explained by the English Court of Appeal in *Edwards and Another v Halliwell and Others* at 1067:

> It has been further pointed out that where what has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others. *The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue. Those exceptions are not directly in point in this case, but they show, especially the last one, that the rule is not an inflexible rule and it will be relaxed where necessary in the interests of justice.* (Emphasis added.)

[49] This type of action was given the name 'derivative action', in view of its true nature that individual members are suing on behalf of the company to enforce rights derived from it (*Wallersteiner v Moir (No 2); Moir v Wallersteiner and others (No 2)* at p 391).

[50] 'Fraud on the minority' was recognised on our shores as the second exception to the rule in *Foss v Harbottle* in *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487 at p 502 (quoted with approval by the Court of Appeal in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 at p 427 and this court in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 at p 124). The essence of the exception as explained in *Edwards and Another v Halliwell and Others* was reiterated by Edgar Joseph J (as he then was) as follows:

> (2) Fraud on the minority: 'where what has been done amounts to what is generally called in these cases as a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others'.

Wrongdoer control

[51] The two constituent elements of the 'fraud on the minority' exception are fraud and control. It is the latter that is the crux of the present appeal.

[52] The question of what is required to establish that a company was in the control of the wrongdoers was raised in *Prudential Assurance Co Ltd v Newman*

Industries Ltd and others (No 2) [1982] 1 All ER 354, where the English Court of Appeal observed that 'control' extends over a broad spectrum of scenarios (at p 364):

> It is commonly said that an exception to the rule in *Foss v Harbottle* arises if the corporation is 'controlled' by persons implicated in the fraud complained of, who will not permit the name of the company to be used as plaintiffs in the suit: see *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474 at p 482. But this proposition leaves two questions at large. *First, what is meant by 'control', which embraces a broad spectrum extending from an overall absolute majority of votes at one end to a majority of votes at the other end made up of those likely to be cast by the delinquent himself plus those voting with him as a result of influence or apathy.* (Emphasis added.)

[53] In *Foss v Harbottle* itself, Sir Wigham V-C envisaged possible scenarios in which minority shareholders may be allowed to sustain a suit on behalf of the company (at p 204):

> The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority is decisive to shew that the frame of this suit cannot be sustained whilst that body retains its functions. *In order then that this suit may be sustained it must be shewn either that there is no such power as I have supposed remaining in the proprietors, or, at least, that all means have been resorted to and found ineffectual to set that body in motion …* (Emphasis added.)

[54] As early as the 19th century, the case of *Russell v Wakefield Waterworks Company* recognised the multiple ways in which wrongdoer control can be established. Noting the necessity of exceptions for the court to do justice in a particular case, Sir Jessel MR offered a number of helpful illustrations (at pp 482–483):

> It is not necessary that the corporation should absolutely refuse by vote at the general meeting, if it can be shewn either that the wrongdoer had command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be shewn that there has been a general meeting substantially approving of what has been done; or if it can be shewn from the acts of the corporation as a corporation, distinguished from the mere acts of the directors of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that they do not intend and are not willing to sue. In all those cases the same doctrine applies, and the individual corporator may maintain the suit. *As I have said before, the rule is a general one, but it does not apply to a case where the interests of justice require the rule to be dispensed with. I do not intend by the observations I have made in any way to restrain the generality of the terms made use of by the learned judge who decided the case of Foss v Harbottle …* (Emphasis added.)

[55] The requirement of control must be properly understood against the background of the rationale underpinning the 'fraud on the minority' exception: to provide redress where necessary in the interests of justice (*Burland*

v Earle, *Edwards and Another v Halliwell and Others*). As is evident from the authorities above, the courts have recognised a range of scenarios where the wrongdoers can be said to be in control of the company, so the company is incapable of suing for its own benefit. Generally, and in particular in a company with equal shareholding, a determination of wrongdoer control based purely on majority or minority shareholding is not conclusive. The central question is whether, in all the circumstances, the company is practically unable to bring the action against the wrongdoers for its benefit.

[56] The position was correctly stated by Edgar Joseph Jr J (as he then was) in *Tan Guan Eng* at p 499:

> The obvious and no doubt the easiest way of determining whether the wrongdoers control a company is to have regard to their shareholdings. If the majority of the shares is held by them then it goes without saying that they are in control of the company; but if that is not the case, it does not necessarily follow that they are not in control, for the court may go behind the apparent ownership of the shares, in order to determine whether the wrongdoers do in fact control the company (see eg *Pavlides v Jensen* 6 per Dankwerts at p 577).

[57] Hence in *Ting Sing Ning (alias Malcolm Ding) v Ting Chek Swee (alias Ting Chik Sui) and others* [2008] 1 SLR 197, the Court of Appeal in Singapore went behind the actual shareholding of the parties and adopted a more flexible approach to establishing control. In that case, a minority shareholder brought a derivative action against the respondents who collectively held a 42% stake in the company. The sister of one of the respondents held 10% of the shares in the company. Chan Sek Keong CJ took into consideration her indirect interest in the litigation and the influence of familial relationships on business decisions, even though it was impossible to conclude without doubt that she would have voted in favour of the respondents. As such, the court held that the sister's shares should be counted as part of the respondents' total shareholding for the purposes of determining the respondents' control over the company.

Derivative action in a deadlock scenario

[58] Where the board of a company is equally split between directors with opposing views, the management of the company is said to be in a deadlock. Where the shareholding of a company is equally split between shareholders taking opposing stances, the body of members of the company is said to be in a deadlock. Based on the principles above, a shareholder is not barred from bringing a derivative action in a deadlock scenario or where the demarcation between majority and minority shareholding is not as straightforward. As Briggs J observed in *Universal Project Management Services Ltd v Fort Gilkicker Ltd and others* [2013] Ch 551 at para [18]:

It is common ground that 'wrongdoer control' will also arise where the aggrieved members and the wrongdoers are in 50/50 control, such that either may prevent the company from suing, and that 'fraud' includes a variety of forms of equitable wrong, including breach of fiduciary duty, although not mere negligence.

[59] Wrongdoer control was held to have been established in a deadlock scenario in a number of cases. In *Barrett v Duckett and others* [1995] 1 BCLC 243, the plaintiff and the primary defendant were equal shareholders in a company. Peter Gibson LJ recognised that the equal split in shareholding did not in principle preclude the plaintiff from bringing the derivative action (at p 250):

Although Mrs Barrett is not a minority shareholder but a person holding the same number of shares as the other shareholder, Christopher, in the circumstances of this case she can be treated as being under the same disability as a minority shareholder in that as a practical matter it would not have been possible for her to set the company in motion to bring the action.

[60] Similarly, in *Anglo-Eastern (1985) Ltd & Anor v Knutz & Ors* [1987] 3 HKC 80, a company, AET, was beneficially owned 50% by Knutz and 50% by Nash through holding companies. The Hong Kong Court of Appeal held that Nash could mount a derivative action for the benefit of AET, despite not technically being a minority shareholder:

Now we accept that Mr Nash is not, factually, a minority ... While strictly speaking there are no minorities in a deadlocked company, we can see no good reason why the procedure employed here should not be countenanced by this court.

[61] The case of *Liu Hsiao Cheng v Wong Shu Wai & Ors* [2015] HKCU 1957 was referred to us by all parties in submission and by the Court of Appeal. The facts of the case were as follows. The plaintiff and the defendant set up a company, GDIL. 50% of the shares in GDIL were held by the plaintiff and his wife, and the other 50% were held by the defendant and his wife. All four were directors of GDIL. The plaintiff commenced a common law derivative action against the defendant for breach of fiduciary duty to GDIL; in response, the defendant counterclaimed also by way of derivative action for the plaintiff's breach of fiduciary duty to GDIL. There was a deadlock both at the board level and in the body of members of GDIL.

[62] Sitting in the Hong Kong Court of First Instance, Anthony Chan J discerned that the issue was whether the plaintiff 'controlled' GDIL so that he can stifle any suggestion of an action by GDIL against him. It was held that the requirement of control can be satisfied as a matter of law in a deadlock situation (at paras [15]–[16]):

Mr Wou accepted that in a deadlock situation, the requirement of control can be satisfied as a matter of law.

A This concession was rightly made. In *Anglo-Eastern (1985) Ltd and Anr v Karl Knutz and Ors* [1988] 1 HKLR 322 at p 329E–F, the Court of Appeal held that, although strictly speaking there are no minorities in a deadlocked company, there is no good reason why a CLDA cannot be brought in such a case. In such circumstances, the shareholder who has committed the wrongful act is in control of the company in the B negative sense that he can prevent the company from taking action (see *Glass v Atkin* [1968] 1 OR 90–93). As Briggs J observed in *Universal Project Management Services Ltd v Fort Gillicker* [2013] Ch 551, §§18 & 54, 'wrongdoer control' will arise where the aggrieved members and the wrongdoers are in 50/50 control, such that either may prevent the company from suing.

C

[63] The same approach has been applied by the High Court in Malaysia. The case of *Ting Chong Maa v Chor Sek Choon* [1989] 1 MLJ 477 concerned a company in which the shareholding was split equally between two shareholders. One of the shareholders brought an action in the company's D name against the other, who was also the director of the company. Peh Swee Chin J (as he then was) held that the requirement of wrongdoer control was satisfied, since the director was prima facie in de facto control of the company (at p 478):

E There is no clear majority so that the plaintiff cannot be in truth a minority shareholder nor the defendant a majority shareholder. However, in my view, being a majority or minority shareholder is not a conclusive test, for what the said exception No 2 says is that the alleged wrongdoer is in control. In the instant case, the defendant has been the managing director, other things being equal, he would prima facie have de facto control of the company. Control here should, in my view, F include de facto control though the defendant has less than a clear majority of shares.

[64] In *Parallel Media Group Plc & Anor v Asia PGA Bhd & Ors* [2004] 6 MLJ 37, both the shareholding and directorship of the company in question G were equally divided between two factions, 'team A' and 'team B'. Suriyadi J (as he then was) explained the concept of de facto control at pp 48–49:

... the minority, equal or majority shareholding status position, has in a large way been overshadowed by the concept of who is in de facto control of the management. In brief, aggrieved shareholders who have no remedy may sue, where directors H having de facto control of the affairs of the company had or had not used their powers in a manner that may benefit themselves, at the expense of the company. *Control can come in many forms, and may be carried out in many ways especially by manipulations, deliberately to ensure that the company is prevented from taking up any action for its own benefit.* A specific example of a party in control is when despite the I contesting parties having equal shareholding power, one of them is strengthened by say, a managing director with a casting vote. The other party which is less fortunate must be treated as being under the same disability as a minority shareholder. Once these recalcitrant directors have not lived up to their sworn duties it is my view that, even if it comes in the form of deliberate apathy, that derivative action may be resorted to. (Emphasis added.)

[65] On the facts, the High Court took note of Team B's 'intangible but real power', being capable of preventing any resolution or action by refusing to act based on sustainable grounds. It was held that the Team A shareholders had locus standi to initiate the derivative action on behalf of the company.

[66] The cases discussed above are in line with the basic principles relating to derivative actions and the rule in *Foss v Harbottle*, and we accept the propositions of law as sound in respect of control stated therein. As a matter of law, a derivative action may be brought by a shareholder for the benefit of a company in which the board of directors and body of members are deadlocked. The requirement of wrongdoer control is satisfied if it can be shown that, having regard to all the circumstances of the case, the company is practically incapable of bringing an action against the wrongdoers for its benefit.

WINDING UP ON THE JUST AND EQUITABLE GROUND

General principles

[67] We turn to consider the alternative remedy suggested by the appellant, namely winding up the company on the just and equitable ground. The remedy is provided for under s 218(1)(i) of the Act:

> 218 Circumstances in which company may be wound up by Court
>
> (1) The Court may order the winding up if —
>
> (i) the Court is of opinion that it is just and equitable that the company be wound up; ...

[68] The meaning of 'just and equitable' was explained by the House of Lords in the leading case of *Ebrahimi v Westbourne Galleries Ltd and others* [1972] 2 All ER 492; [1973] AC 360. The case concerned a petition brought under s 222(f) of the UK Companies Act 1948, which is in pari materia with our s 218(1)(i) above. The applicability of the principles expounded in *Ebrahimi* to the Malaysian context was confirmed by the Privy Council in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 at p 434.

[69] In *Ebrahimi*, Lord Wilberforce explained the words 'just and equitable' in the following terms at p 379:

> The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company

A structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

[70] Lord Wilberforce went on to enumerate a number of elements typically present where the 'just and equitable' ground is invoked:

> The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence — this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.
>
> It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves.

[71] It is noted that these elements are non-essential, and are not to be interpreted as preconditions before the just and equitable clause can be relied upon: *Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd* [1995] 1 MLJ 769 at p 776.

[72] Lord Wilberforce explained that through the just and equitable clause, certain obligations common to partnership relations may come in; the analogy to partnership is convenient because the concepts of probity, good faith, and mutual confidence, developed in partnership law, become relevant considerations once the elements stated above are found to exist (at p 379).

[73] Pertinently, it was emphasised in *Ebrahimi* that it would be 'impossible, and wholly undesirable, to define' all the circumstances in which a company should be wound up on equitable considerations (at p 379). Lord Wilberforce expressly rejected the creation of particular categories of cases for the just and equitable clause to apply (at p 375):

> ... there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances.

[74] The common law has come to recognise that the just and equitable provision is 'capable of application in diverse circumstances (per the Singapore Court of Appeal in *Chong Choon Chai & Anor v Tan Gee Cheng & Anor* [1993] 3 SLR 1 at p 7, commenting on the equipollent s 254(1)(i) of the Singapore Companies Act 1990). Examples of situations where the provision does and does not apply were given by the Singapore Court of Appeal in *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR 827 at para [31]:

> We accept that the notion of unfairness lies at the heart of the just and equitable' jurisdiction in s 254(1)(i) of the CA and that that section does not allow a member to 'exit at will', as is plain from its express terms. Nor does it apply to a case where the loss of trust and confidence in the other members is self-induced. It cannot be just and equitable to wind up a company just because a minority shareholder feels aggrieved or wishes to exit at will. *However, unfairness can arise in different situations and from different kinds of conduct in different circumstances. Cases involving management deadlock or loss of mutual trust and confidence where the 'just and equitable' jurisdiction under s 254(1)(i) has been successfully invoked can be recharacterised as cases of unfairness, whether arising from broken promises or disregard for the interests of the minority shareholder. Unfairness can also arise in the loss of substratum cases.* (Emphasis added.)

Winding up in a deadlock scenario

[75] In cases where there was a deadlock in the board of directors and body of members in a company, the courts have exercised jurisdiction under the just and equitable provision to order a company to be wound up. A prominent example is *In re Yenidje Tobacco Company, Limited* [1916] 2 Ch 426. In that case, the two shareholders in the company had equal voting rights; they were also the only two directors with no casting vote. The directors were not on speaking terms with one another, and the business of the company could not be carried on. The English Court of Appeal held that there was 'no way to put an end to the state of things which now exists except by means of a compulsory order' to wind up the company on just and equitable grounds. Lord Cozens-Hardy MR further noted that the remedy of winding up under the just and equitable clause was available to, but not confined to, a deadlock scenario (at p 432):

> It has been urged upon us that, although it is admitted that the 'just and equitable' clause is not to be limited to cases ejusdem generis, *it has nevertheless been held, according to the authorities, not to apply except where the substratum of the company has gone or where there is a complete deadlock. Those are the two instances which are given, but I should be very sorry, so far as my individual opinion goes, to hold that they are*

A *strictly the limits of the 'just and equitable' clause as found in the Companies Act*. I think that in a case like this we are bound to say that circumstances which would justify the winding up of a partnership between these two by action are circumstances which should induce the Court to exercise its jurisdiction under the just and equitable clause and to wind up the company. (Emphasis added.)

B

[76] *Yenidje Tobacco* was considered by the Singapore Court of Appeal in *Chua Kien How v Goodwealth Trading Pte Ltd & Anor* [1992] 2 SLR 296. The facts of the case were these. The petitioner and the respondent were co-directors who jointly managed the company. It was disputed whether the C petitioner and the respondent had equal shares; the respondent would have a majority if his shareholding included a particular bloc of shares, the beneficial ownership of which was yet to be determined in another proceeding. Disagreements arose: the petitioner and the respondent did not communicate with each other; the company did not make any corporate decision, submit tax D returns and audited accounts, or hold annual general meetings. There was a deadlock in the company at the board level and in its body of members.

[77] Having examined *Yenidje Tobacco*, Chan Sek Keong J (as he then was) distilled the following principle (at p 305):

E

> The principle can be simply expressed: if the only two directors of a company cannot agree with each other, and neither can overrule the other, there is a deadlock which, if it occurs in a partnership, justifies the court in winding up the partnership.

F **[78]** The Singapore Court of Appeal considered that the winding up judge was entitled to find that the company was unable to function as a commercial entity as a result of the deadlock, even though the ownership of the bloc of disputed shares had not been resolved. Accordingly, the court upheld the order to wind up the company on the ground that it was just and equitable to do so.

G

[79] In Malaysia, the question of winding up a deadlocked company under s 218(1)(i) was considered in the case of *Ng Eng Hiam v Ng Kee Wei & Ors* [1965] 1 MLJ 238. The shareholding of the company in question was divided equally between two families, and its management was vested in two H permanent directors — one from each family — with no casting vote. One of the directors, supported by half of the shareholders, filed a petition to wind up the company. The issue before the Privy Council was whether such a deadlock existed in the affairs of the company as to make it just and equitable to wind up the company.

I

[80] Lord Donovan explained that a complete deadlock in the management of a company, in principle, justifies the winding up of the company:

> *The question whether such a deadlock exists as makes it just and equitable to wind the company up is a question predominantly of fact in each case. The principle is clear that*

if the court is satisfied that complete deadlock exists in the management of a company the jurisdiction will be exercised. See *Buckley on Companies* (13th Ed) p 456. It may be that the jurisdiction will be more readily exercised where (as is alleged to be the case here) although the business is carried on by means of a private limited company, the case is one not unlike a partnership. (Emphasis added.)

[81] However on the facts, the Privy Council took note of the observations of the Supreme Court that the dispute between the feuding parties had not reached a stage that precluded all reasonable hope of reconciliation and friendly co-operation, and that in the circumstances it would be unfair for the shareholders to wind the company up. As such, the Privy Council held that the discretion of the Supreme Court in dismissing the petition was properly exercised.

[82] The authorities above indicate that a deadlock scenario is one of the circumstances where the court may exercise its jurisdiction to wind up the company on just and equitable grounds. As a matter of law, a petition to wind up a company under s 218(1)(i) of the Act may be brought by a shareholder where there is a deadlock in the board of directors and shareholders of the company.

AVAILABILITY OF ALTERNATIVE REMEDIES

[83] It is thus apparent that a derivative action is not the only remedy available to a shareholder of a company in a deadlock scenario. This brings us to the next issue: whether the availability of winding up on the just and equitable ground, as an alternative remedy, bars a shareholder from bringing a derivative action on behalf of the company.

[84] A number of cases have considered the interplay between derivative actions and petitions for winding up on the just and equitable ground, and these cases merit examination in further detail. The authority relied upon by the first defendant, and distinguished by the Court of Appeal below, is *Barrett v Duckett and others* [1995] 1 BCLC 243. In that case, the plaintiff and the defendant each held 50% shares in a company, Nightingale Travel Ltd ('Travel'). The primary defendant was the plaintiff's former son-in-law and was also the sole director of Travel. The primary defendant filed a petition to wind up Travel on the ground that it was just and equitable to do so, given the deadlock in the company. Subsequently, the plaintiff commenced a derivative action on behalf of Travel against the defendant, alleging that the primary defendant diverted business from Travel to another company in which he was a shareholder. The defendants applied to strike out the plaintiff's action on the basis that an alternative remedy existed.

[85] Peter Gibson LJ (for the majority) stated the following proposition of law (at p 250):

> The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available. Conversely if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed.

[86] In support of that proposition, the majority in the English Court of Appeal quoted the cases of *Ferguson v Wallbridge* [1935] 3 DLR 66 and *Fargro Ltd v Derek Godfroy and others* [1986] BCLC 370; [1986] 3 All ER 279, which held that the court will not allow a shareholder to bring a derivative action on behalf of a company in liquidation. Unlike the companies in those two cases, Travel was not in liquidation at the time the derivative action was commenced. Nevertheless, Gibson LJ took into account, among others, the following factors:

(a) the principal defendant's attempt to wind up the company 'came after a long period of deadlock';

(b) the winding-up petition 'preceded not only the commencement of the [derivative] action but also any intimation that the action would be commenced'; and

(c) the plaintiff was given, but rejected, the opportunity to have Travel put into a creditors' voluntary liquidation.

[87] The fact that there was no certainty that the liquidator would sue, and that the plaintiff had no means to compel him to sue, was held to be no answer to the objection that winding up was available as an alternative remedy.

[88] It is significant that the majority in the judgment of *Barrett v Duckett and others* also concluded that the plaintiff was not pursuing the action bona fide on behalf of the company, but was motivated by personal concerns arising from matrimonial disputes between her daughter and her former son-in-law. Additionally, it did not escape the court's notice that the two defendants were legally aided persons, and litigation would incur expenditure to the public purse and to the company's resources (Bedlam LJ's minority judgment at p 257). In view of the unique circumstances of the case, the court held that a derivative action was inappropriate (at p 255):

> I therefore conclude that in the unusual circumstances of this case, the opportunity that Travel be put into liquidation which was offered and continues to be offered by Christopher can be said to provide an alternative remedy such as makes the derivative action inappropriate.

[89] On a closer analysis, it is noteworthy that both the cases cited in *Barrett v Duckett and others* in respect of alternative remedies concerned companies which were already in liquidation when the derivative action was commenced. In the first case, *Ferguson v Wallbridge*, the plaintiff, a shareholder of the company, brought an action on behalf of himself and all other shareholders except the defendants. At the time the writ was filed, the company was in voluntary liquidation. However, the Privy Council considered that the form of action would have been permissible if the company was a going concern:

> The permissibility of the form of proceeding thus assumed, where the company concerned is a going concern, is an excellent illustration of the golden principle that procedure with its rules is the handmaid and not the mistress of justice.

[90] As such, it was held that once the company goes into liquidation, the rationale for allowing a shareholder to bring a derivative action for the benefit of the company disappears. Lord Blanesburgh articulated the reasoning as follows:

> But *cessante ratione legis, cessat lex ipsa*. So soon as the company goes into liquidation the necessity for any such expedient in procedure disappears. Passing over the superficial difficulty that a company in compulsory liquidation cannot be proceeded against without the leave of the court, the real complainants, the minority shareholders, are now no longer at the mercy of the majority, wrongly retaining the property of the company by the strength of their votes. If the liquidator, acting at the behest of the majority, refuses when requested to take action in the name of the company against them, it is open to any contributory to apply to the court, and ... it is open to the court, on cause shown, either to direct the liquidator to proceed in the company's name or on proper terms as to indemnity, and otherwise to give to the applicant leave to use the company's name as plaintiff in any action necessary to be brought for the vindication of the company's rights.

[91] Accordingly, the action brought by the shareholder was found to be incompetent.

[92] A similar approach was adopted in the second case, *Fargro Ltd v Derek Godfroy and others* [1986] BCLC 370; [1986] 3 All ER 279. In that case, the company was a 'deadlocked company', with equal shareholders and an equally split board of directors. One of the shareholders commenced a derivative action on the company's behalf. When the writ was issued, the company was in liquidation. Walton J first observed that, had the company not been in liquidation, the matters alleged in the statement of claim would have laid a proper foundation for a derivative action; it was impossible for the plaintiff to set the company in motion to bring the action.

[93] But 'once the company goes into liquidation the situation is completely changed', and the right of action now vested in the liquidator. A 'variety of

courses' is open to the plaintiff shareholder: he can ask the liquidator to bring the action in the name of the company; or, if the liquidator is unwilling to do so, he can seek an order of court either that the liquidator brings the action or that he is given the right to bring the action in the company's name. That being the case (at p 281):

> Now as a matter of logic, it seems to me quite clear that, that being the situation, and the plaintiff no longer being subject to the veto of the third defendant as the other equal shareholder, the reason for any exception to the rule in *Foss v Harbottle* disappears.

[94] Pertinently, Walton J underlined the significance of the difference between a company as a going concern and a company in liquidation. After considering *Ferguson v Wallbridge*, the court articulated that (at p 282):

> So there is clear authority in the Privy Council as to the vast distinction that there is between the position where the company is a going concern and the minority shareholders' action can be brought, and a case where when it goes into liquidation, where there is no longer any necessity for bringing a minority shareholders' action. Because, subject if necessary to obtaining the directions of the court, which is in itself an excellent thing as acting as a filter against any totally wrong-headed action, the action can be brought directly in the name of the company as it should be so brought.

[95] We consider the decisions in *Fargro Ltd v Derek Godfroy and others* and *Ferguson v Wallbridge* to be sound: in the context of a company in liquidation, the rationale underlying the exception to the rule in *Foss v Harbottle* no longer operates. However, the reasoning in the two cases do not lend support to the broad proposition in *Barrett v Duckett and others* that the availability of winding up as an alternative remedy operates as a bar to a derivative action, in respect of a company which is a going concern.

[96] *Barrett v Duckett and others* was followed by the Singapore Court of Appeal in *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] SGCA 18, albeit in the context of a statutory derivative action. On the facts, the four shareholders of the company in question, all of whom were directors, were divided into two factions, each holding 50% of the shares. There was no deadlock in board of directors, for there was a fifth director aligned with one of the factions. Two of the shareholders sought leave to commence a statutory derivative action. The other two shareholders then filed a petition to wind up the company. The judge at first instance dismissed the leave application on the basis that it would be more sensible and desirable to wind up the company.

[97] On appeal, the Singapore Court of Appeal held that in considering the requirements for a statutory derivative action, the court 'should also consider whether there is another adequate remedy available, such as the winding up of

the company' (at para [22]). It was noted that the option of winding up had been proposed prior to the filing of the derivative action, and was 'not an afterthought'. In the circumstances, the court held that it was 'eminently sensible for the parties to bring to an end a business relationship which had unfortunately evolved into a very unproductive and acrimonious one over the years', and affirmed the decision of the judge to wind up the company.

[98] The effect of *Pang Yong Hock* was recently revisited by the same court in *Ting Sing Ning*, which concerned a common law derivative action. Chan Sek Keong CJ opined that the decision in *Pang Yong Hock* was not on the basis that winding up was an alternative remedy, but in fact on the basis that the applicants had not made out a prima facie case against the respondents (at para [28]):

> The appeal was dismissed but not for the reason that, as a matter of law, winding up PKS was an alternative remedy. *In other words, it is not clear that Pang Yong Hock establishes the principle that when the remedy of a winding up is available, the court should not entertain any application to pursue a s 216A action, however meritorious it may be.* (Emphasis added.)

[99] The Singapore Court of Appeal proceeded to hold that the appellant was at liberty to pursue a common law derivative action, notwithstanding the availability of alternative remedies such as winding up and an action for minority oppression.

[100] We are of the view that the dicta in *Barrett v Duckett and others* ought to be confined to, and understood against the background of, the unusual circumstances of the case. In respect of a company which is a going concern, we consider the correct position of the law to be as stated in H Tijo, P Koh, PW Lee, *Corporate Law* (Singapore: Academy Publishing, 2015) at p 440:

> The decision in *Barrett v Duckett* [1995] 1 BCLC 243, therefore, may be better understood as a case where the court, in the light of the very real possibility that the company would be placed in liquidation, had decided that a derivative action by a shareholder was simply, as Gibson LJ himself put it, 'inappropriate' (*Barrett* at 255). The position vis-a-vis the availability of alternative proceedings or processes should be as put forth by Judge Reid QC, sitting as a judge of the High Court, in *Mumbray v Lapper* [2005] EWHC 1152; [2005] BCC 990 at [5]):
>
> > *[T]he true position is that, while the availability of an alternative remedy is a factor, and may well be an extremely important factor, it is not an absolute bar and the fact that it is possible to point to some other alternative method of achieving the desired result does not mean that it is inevitably inappropriate for permission for a representative action to be continued.* (Emphasis added.)

[101] The broad proposition that a derivative action is disallowed if winding up is available as an alternative remedy in respect of a company which is a going

A concern lacks support in authority and basis in principle. The option of winding up does not itself operate as an automatic bar to a shareholder bringing a derivative action on behalf of a going concern company. Additionally, we note that winding up a company which is a going concern has generally been regarded as a drastic measure (*Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai* B *Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 at p 233). The appropriate route for a shareholder in any case would depend on the nature of the relief sought, and whether the necessary elements for the remedy could be satisfied on the facts and circumstances of the case.

C *Summary*

[102] To summarise, the following principles can be distilled from the authorities discussed above:

D (a) where there is a deadlock in the board of directors of the company, recourse should be made to shareholders in a general meeting for resolution, subject to the articles of association of the company;

(b) where there is a deadlock in both the board and the shareholders of the E company which is a going concern, there is no objection in principle to a shareholder bringing a derivative action on behalf of the company. In this regard:

(i) the test to establish 'wrongdoer control' is one of substance. The F requirement of control is satisfied where the company is practically incapable of being set in motion to bring an action against the wrongdoers for its benefit;

(ii) a deadlock situation with no clear-cut majority or minority shareholders does not preclude an equal shareholder from bringing G a derivative action on behalf of the company; and

(iii) a shareholder may not bring a derivative action on the company's behalf if the company is already in liquidation;

(c) where there is a deadlock in the board and the shareholders of the H company which is a going concern, there is no objection in principle to a shareholder filing a petition to wind up the company on just and equitable grounds under s 218(1)(i) of the Act; and

(d) the availability of winding up the company on just and equitable I grounds under s 218(1)(i) as an alternative remedy does not in itself disentitle a shareholder from opting instead to bring a derivative action on behalf of the company which is a going concern.

THE PRESENT APPEAL

[103] Before us, the grounds relied on by the second defendant to challenge the plaintiff's right to bring the present action may be summarised as follows:

(a) the plaintiff, not being a minority shareholder, could not bring a derivative action on behalf of the company as a matter of law;

(b) the only remedy for a shareholder in a deadlocked company is to wind up the company on just and equitable grounds; and

(c) a derivative action could not be brought where there is an alternative remedy.

[104] The three grounds above are contrary to the principles on derivative actions and winding up as canvassed above in respect of a company which is a going concern. With regard to the first point, we note that the plaintiff and the second defendant hold equal shares in the first defendant. The plaintiff's nominee (PW1) and the second defendant's nominee (the third defendant) are the only two directors on the board of the first defendant. There was a deadlock both in the board of directors and the body of members of the first defendant. It is also undisputed that in March 2011 the second defendant had taken over the books and accounts of the first defendant. In these circumstances, it would not have been possible for the plaintiff to set the first defendant in motion to bring an action against the second and third defendants; by virtue of the second and third defendants' equal shareholding and position in the board of directors, the first defendant was practically incapable of bringing an action for its own benefit. We consider that these facts are sufficient to establish, on a prima facie level, the element of control for the purposes of a derivative action.

[105] With regard to the second and third points, as canvassed above, a derivative action and a winding-up petition on the just and equitable ground are both remedies potentially available to a shareholder in a company which is a going concern, in which the board of directors and body of members are deadlocked. The existence of winding up as an alternative remedy does not preclude the plaintiff from bringing a derivative action on the first defendant's behalf.

[106] In any event, the second defendant has not adduced evidence to indicate that the option of winding up the first defendant under s 218(1)(i) of the Act was considered as an alternative remedy at the time that the present suit was filed. On the facts, at the time the derivative action was instituted, the first defendant company appeared to be treated as a going concern; there was no question of the first defendant being in liquidation. It is conspicuous that the second defendant themselves did not file a petition to wind up the first defendant either before or after the plaintiff commenced the present suit.

[107] In the premise, it is not open for the second defendant now to raise the theoretical availability of the winding up remedy, as a basis to contend that the action should not have been allowed to proceed in the first place. The grounds of objection raised by the second defendant are dismissed, and we find that the derivative action was properly constituted.

CONCLUSION

[108] In view of the foregoing, we answer the question of law posed in the affirmative. We dismiss the appeal with costs.

[109] Nevertheless, having scrutinised the grounds of judgment of the Court of Appeal, we note that the Court of Appeal had identified the wrongdoers and victims in no equivocal terms and found 'overwhelming evidence' that the wrongdoers were in control of the company. It must be reiterated that at the preliminary stage as established in *Prudential Assurance*, all the plaintiff needs to establish is a prima facie case that the company can succeed on the claim, and that the action falls within an exception to the rule in *Foss v Harbottle*; whether the plaintiff can successfully prove the elements of fraud and control is another matter altogether.

[110] We are of the view, with respect, that in determining the preliminary issue of whether the derivative action was properly constituted, the Court of Appeal had erred in making absolute findings of fact on the issues of wrongdoing and control. We therefore set aside the findings of fact made by the Court of Appeal in determining the preliminary issue and remit the case to be heard on its merits before another panel of the Court of Appeal.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor